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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 92) is reported in 24 B. T. A. 1181. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 109) is reported in 58 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1932. (R. 115.) The petition for a writ of certiorari was filed August 4, 1932, and was granted October 17, 1932. (R. 116.) The ju-

risdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the gratuitous termination of a power to revoke a trust is subject to the tax which is imposed by Section 319 of the Revenue Act of 1924 on a "transfer * * * by gift * * * of any property * * *, whether made directly or indirectly.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 30–40.

STATEMENT

The facts of this case are not in dispute. They were stipulated (R. 10–92), and the Board of Tax Appeals incorporated this stipulation in its opinion by reference (R. 92). They may be summarized as follows:

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two trusts, one for the benefit of his son (Ex. 2, R. 20) and one for the benefit of his daughter (Ex. 15, R. 58). The terms of each were much the same and provided that the trusts should continue for ten years, unless sooner terminated. (R. 21, 59.) The trustees were directed to pay annually to each beneficiary the income to the extent of $30,000 or such larger amount as the settlor at any time should provide.

(R. 21, 59.) In each case it was provided that at the end of the ten-year period the trustees should turn over the principal and accumulated income to the beneficiary; if the beneficiary died before the end of the ten-year period, the principal was to be paid to his children; but if there should be no children surviving, then the principal and accumulated income was to be paid, in the case of the son's trust, to the settlor, and in the case of the daughter's trust, to the trustees of the son's trust, for the benefit of the latter. (R. 22–23, 60–61.) The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. (R. 23–25, 61–63.) Among them was an unrestricted right to modify, alter, and revoke the trusts except as to income received or accrued. (Paragraph Eleventh of Exs. 2 and 15, R. 25, 63.)[1]

On July 13, 1925, the settlor modified the trusts by eliminating this power of revocation. (Ex. 14, R. 54; Ex. 26, R. 89.) The fair market value on that date of the securities constituting the corpus of the trust for the son was $6,304,548.25, which amount included $61,644.62 representing interest accrued but not yet received and not reflected in the market quotations of the securities comprising the

[1] On several occasions the respondent exercised his power to modify and alter the trusts. These alterations included a change of the duration of the trusts (Ex. 8, R. 34; Ex. 21, R. 72), and the transfer of the powers of management and administration from the respondent to others (Ex. 9, R. 41; Ex. 22, R. 79). Other amendments are also shown by the record. (Ex. 3, R. 29; Ex. 10, R. 46; Ex. 13, R. 50; Ex. 14, R. 54; Ex. 16, R. 67; Ex. 25, R. 85; Ex. 26, R. 89.)

corpus. The fair market value at that time of the corpus of the daughter's trust was $6,805,915.19, which amount included $54,904.09 of such interest. (R. 16.)

The respondent filed with the Collector a gift tax return for the year 1925, but did not include in it any part of these amounts. (R. 17.) The petitioner determined that the whole thereof should have been included (Ex. 1; R. 17), and accordingly, on March 8, 1929, mailed to the respondent a notice of a deficiency in tax of $2,465,681.20 (R. 10).

Before the Board it was agreed that the amounts of interest accrued but not received, amounting together to $116,548.72, should be deducted from the total value of the corpus of the two trusts and the tax reduced accordingly. (R. 16.) Upon review by the Board, the determination of the Commissioner was approved, except as so modified, and a decision was entered that there is a deficiency of $2,436,544.02. (R. 104.) The taxpayer appealed to the Circuit Court of Appeals for the Second Circuit, which reversed the decision of the Board. (R. 115.)

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the respondent's relinquishment of his power of revocation was not a transfer of property within Section 319 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

By Section 319 of the Revenue Act of 1924 (*infra*, p. 36), a tax is imposed "upon the transfer * * * by gift * * * of any property wherever situated, whether made directly or indirectly. * * *" The only question in this case is whether the termination of the respondent's power to revoke the trusts was a transfer, either direct or indirect, within the meaning of this statute.

Article 1 of Regulations 67, relating to the gift tax, expressly provides that the relinquishment of a power to revoke is taxable. This regulation was promulgated more than eight months before the respondent in this case terminated his power of revocation, and it has remained in effect unchanged ever since. We submit that this is a reasonable and necessary provision, and should be enforced.

Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 of the Revenue Act of 1924 as Section 324 of the Revenue Act of 1926 (*infra*, p. 36), without any change of language. This reenactment of the statute in the face of the administrative construction amounts to a legislative recognition and approval of the statute as so construed.

II

This Court has decided that the termination of a power of revocation is in substance a transfer. The decisive question involved in *Chase National Bank* v. *United States,* 278 U. S. 327, is the same as the one in the case at bar. The controlling question there was whether termination of a power of disposition was a *transfer* of the property subject to the power. A similar result was reached in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. These cases establish that the time of transfer of the technical legal or equitable title is neither decisive nor material.

The power which the respondent retained over the trust property was sufficient to enable him to revest title in himself. This Court has held that such a power is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

The *Chase National Bank* and *Northern Trust cases* are not inapplicable on the ground that the issues there were directed to constitutionality, while here the question raised is solely one of interpretation. In each of those cases this Court, in order to sustain the tax, was required to hold that there was a *transfer* of property. *Heiner* v. *Donnan,* 285 U. S. 312.

III

The word "transfer" was used in the gift tax provisions of the statute in the same sense as it was used in the estate tax provisions. The two kinds of taxes were imposed by the same act and were merely parts of a single coherent taxing scheme. The statute was drawn to reach the passage of property by gift in either case, and what is a transfer for purposes of the estate tax is no less a transfer for purposes of the gift tax.

The court below attached significance to its statement that Section 302 (d) of the Revenue Act of 1924 (*infra*, pp. 33–34) for the first time specifically mentioned powers of revocation in the estate tax provisions, while this was not done in the gift tax sections. But the court's premise is too broad. Section 302 (d) related to powers to *change*, not merely to powers to *revoke*. Property subject to powers of revocation was taxable as a part of the gross estate under the earlier estate tax acts. Moreover, even if the court's premise had been sound, its conclusion would not follow. The estate tax imposed by the Revenue Act of 1924, as in the other revenue acts, was imposed upon the transfer of the *net estate*, and it was of course necessary for the purpose of measuring the tax to prescribe what should be included in the net estate. But the gift tax was laid upon the transfer of *property*, so that there was no similar necessity to define the subject of the transfer upon which the tax was imposed.

IV

The conclusion of the court below that the gifts were completed in 1917 is plainly erroneous and is inconsistent with a later decision by the same court. Although it is undoubtedly true that a trust subject to a power of revocation is valid as a trust, it does not follow that such a trust has the incidents of a completed gift. The contrary has been established by this Court.

In a decision more recent than its decision in the case at bar, the court below dealt with the taxability, as part of the estate of a decedent, of property placed in trust by him for the benefit of other persons, but as to which he reserved a right to change the beneficiaries in favor of others than himself. *Porter* v. *Commissioner,* 60 F. (2d) 673, certiorari granted November 14, 1932, No. 466, October Term, 1932. The court, contrary to its position in the present case, relied upon the fact that so long as the settlor retained his power to "divest" the beneficiaries there was no gift to them.

ARGUMENT

By Section 319 of the Revenue Act of 1924 (*infra,* p. 36), a tax is imposed for each taxable year—

> upon the transfer by a resident by gift during such taxable year of any property wherever situated, whether made directly or indirectly, * * *.

The only question in this case is whether the termination of the respondent's power to revoke the

trusts was a transfer, either direct or indirect, within the meaning of this statute.

The Circuit Court of Appeals concluded, in accordance with the taxpayer's argument, that termination of the settlor's power of revocation was not made taxable by Section 319. The court based its decision on the ground that the transfer of property made taxable by the statute is a transfer of technical title, and that, since a power of revocation gives its holder no title, its surrender is not a transfer of property. The court also concluded that the gifts were made when the trusts were created, not when the settlor relinquished his control over them. In reaching this result the court disregarded the express provisions of the regulations, and failed, we submit, to apply the principles established by this Court in analogous cases.

I

THE REGULATIONS EXPRESSLY PROVIDE THAT THE RELINQUISHMENT OF A POWER TO REVOKE IS TAXABLE, AND THESE REGULATIONS HAVE RECEIVED LEGISLATIVE APPROVAL

By Section 1001 of the Revenue Act of 1924 (*infra*, p. 36) authority was expressly granted to the Commissioner of Internal Revenue to issue regulations with the approval of the Secretary of the Treasury. In accordance with this authority Regulations 67, relating to the gift tax, were duly promulgated on November 8, 1924, more than eight months before the respondent in this case termi-

nated his power of revocation. Article 1 of these regulations (*infra*, pp. 38–40) contains the following express provision applicable to the situation in this case:

> The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

This regulation, we submit, was a reasonable and necessary provision. It is obvious that when a person creates a revocable trust, and then terminates his power of revocation, a transfer has occurred at some time; and the statute expressly applies to transfers "whether made directly or indirectly." But the real transfer is not effected by the mere creation of a revocable trust. The settlor of such a trust retains complete control over the property; the income from the property is taxable to him (*Corliss* v. *Bowers*, 281 U. S. 376); and on the settlor's death the property is taxable as a part of his estate (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339). Not until the power is terminated does the gift become final and effective. These considerations, developed more at length below in this brief, make it plain, we believe, that the Commis-

sioner's regulation was not only a reasonable but a necessary one. The regulation has now been in force without change for over eight years. Since the regulation is reasonable and has been consistently followed by the administrative authorities, it should be followed and enforced by this Court. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Ex parte Reed*, 100 U. S. 13.

Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 of the Revenue Act of 1924 as Section 324 of the Revenue Act of 1926 (*infra*, p. 36), without any change of language. This reenactment of the statute so construed by the administrative authorities amounts to a legislative recognition and approval of that construction. *National Lead Co.* v. *United States*, 252 U. S. 140; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Universal Battery Co.* v. *United States*, 281 U. S. 580; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *United States* v. *Kirby Lumber Co.*, 284 U. S. 1.[2] Since the respondent concedes that the sole question involved is one of construction (Br. in Opp. 6), this circumstance seems decisive.

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[2] Although the gift tax provisions of the Revenue Act of 1932 contain specific reference to the termination of a power of revocation, the legislative history shows plainly that this was not intended to represent a change in the law as interpreted by the regulations under the 1924 Act. See note 6, *infra*, pp. 21–22.

Not only has the regulation received legislative approval, but its correctness is shown by an examination of this Court's decisions in closely related cases, which are discussed below.

II

THIS COURT HAS DECIDED THAT THE TERMINATION OF A POWER OF REVOCATION IS IN SUBSTANCE A TRANSFER

The decisive question involved in *Chase National Bank* v. *United States*, 278 U. S. 327, is the same as the one in the case at bar, except that there the question related to the termination of a power of control at death while here it relates to termination during life. In the *Chase National Bank case*, as here, the tax involved was in terms imposed upon a *transfer*.[3] The only difference is that there the tax was laid on "the transfer of the net estate,"

[3] In his brief in opposition (pp. 4–5), the respondent contended that in the *Chase National Bank case* and in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, this Court was not dealing with a statute applying to transfers. This contention is obviously incorrect. By Section 401 of the Revenue Act of 1921 (*infra*, p. 30), the tax involved in those cases was imposed upon transfers just as in Section 319 now in issue. In the *Chase National Bank case* this Court stated specifically (p. 334) that "the statute in terms taxes transfers," and it concluded its decision by saying (p. 339) that "It is the *transfer* * * * which is the subject of the tax." (Italics ours.) The Court also said (p. 337): "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee."

and the net estate by definition in another section of the statute included certain described "miscellaneous items of property" (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348), while here the tax is laid on "the transfer * * * of any property," without limitation. In both cases title to the property in question had passed from the donor and become "vested" in others; all the donor retained was a power of disposition. In neither statute was the termination or relinquishment of such a power specifically described or referred to. It is true that the statute defining the "net estate" involved in the *Chase National Bank case* specifically referred to insurance; but the express provision of Section 401 of the Revenue Act of 1921 made it plain that this applied only to insurance of which there was a *transfer* at death. The controlling question in the *Chase National Bank case* (pp. 334–335), as at bar, was whether termination of that power was a *transfer* of the property subject to it. This Court held that it was a transfer, and in consequence upheld the tax against constitutional objections based upon exactly the same reasoning as that advanced by the respondent and by the court below in this case. Termination of the power, this Court said (p. 335), was "no less a transfer" of the property subject to it than a transfer effected in other ways. It cited *Saltonstall* v. *Saltonstall*, 276 U. S. 260, as authority for the proposition that the freeing of the property of

the possibility of exercise of the power "effected a transfer," because, as said in that case (p. 271), it is "the shifting of the economic benefits and burdens of property" which is important, not the conveyance of technical title. Such a power, while outstanding, the *Chase National Bank case* pointed out (pp. 336–337), left the gift incomplete as to both donor and donee, and not until its termination was the transfer of the property complete. Termination, it was said (p. 339), operated "as an effective transfer."

If these things were true in the *Chase National Bank case* they are no less true here. In each an excise was laid upon the privilege of transferring property; in the one case at death, in the other during life. Had there been no transfer in the *Chase National Bank case* there could have been no tax. And the fact that there was a transfer there is conclusive that there was one here; the principle is the same irrespective of the time when the privilege of revocation is terminated.

Like the *Chase National Bank case, Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *supra,* involved the estate tax title of the Revenue Act of 1921. As in the case at bar, the statute made no specific reference to the termination of a power of disposition. Again this Court held, as in the *Chase National Bank* and *Saltonstall cases,* that the termination of such powers constituted (p. 345) "transfers of the corpus" or property subject to the powers, and

accordingly sustained the tax against constitutional objections based (p. 345) upon the ground, relied upon here by the court below (R. 114), and by the respondent, that technical title had long since passed out of the donor.

These cases establish that the time of transfer of technical legal or equitable title is neither decisive nor material. As this Court said in *Tyler* v. *United States*, 281 U. S. 497, 503:

> The question here * * * is, not whether there has been, in the *strict* sense of that word, a " transfer " of the property by the death of the decedent, * * * but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. (Italics ours.)

And this Court there held accordingly that termination by death of a tenancy by the entirety, though in a *strict* sense not a transfer of rights in property since technical title did not pass, was such in substance, and upheld the tax against constitutional objections based on the argument (p. 502) that "no right in such property is transferred by death, but the survivor retains only what he already had," which is in effect the theory upon which the court below decided this case.

If, viewed in its substance, there was a transfer of property in the *Tyler case* when one tenant died, there was certainly no less a transfer of property here when the taxpayer relinquished his power of disposition. In the former the survivor's rights were in no way subject to control or diminution at the hands of the decedent, while at bar the taxpayer had an interest great enough to permit him to revest title in himself and which this Court has said is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116. In the case last cited this Court said in respect of a donor of property who reserves a power of revocation (p. 116) that—

> While he has technically parted with title, yet *he in fact retains ownership, and all its incidents.* (Italics ours.)

In the *Corliss case* the taxpayer had a power of revocation similar to that retained by the taxpayer here. He argued that he could not constitutionally be subjected to tax upon the income from the trust property because he had neither the legal nor the equitable estate and therefore had no interest in the property. But this Court answered (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title. The Court continued:

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

So long as he retained his power of control the respondent at bar was taxable upon the trust income because that power made him substantial owner of the corpus.[4] *Corliss* v. *Bowers, supra; Poe* v. *Seaborn, supra.* When he relinquished his right of control and rid himself of the ensuing liability he accomplished the transfer of substantial ownership and dominion from himself to another. This was in the fullest sense a transfer of property.

The *Chase National Bank, Northern Trust* and *Saltonstall cases* are not inapplicable because, as the court below held, there the issues were directed to the point of constitutionality (R. 112–113) while here, as the court said (R. 110), the question is solely one of interpretation, the taxpayer having waived all constitutional questions. In each of these cases the basis of the claim that the statute was unconstitutional was that there was no *transfer* of

[4] Section 219 (g) of the Revenue Act of 1924, a new provision in that Act, expressly made the income taxable to the settlor; but it has been held that this provision was merely declaratory, and that the income in such a case was likewise taxable to the settlor under earlier Acts. *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5th); *Dickey* v. *Burnet*, 56 F. (2d) 917, 920 (C. C. A. 8th), certiorari denied October 10, 1932.

In his brief in the Circuit Court of Appeals the respondent stated (pp. 5–6) that he gave up his right to revoke the trusts in order to escape tax upon the income.

property upon termination of the donor's reserved power of disposition because title to the property had already passed from him and become "vested" in others. This is precisely the argument the respondent at bar advances for the purpose of taking himself outside the scope of Section 319.[5] But in each of the cases referred to this Court held that there was a *transfer* of property upon termination of the power at death.

That the tax involved in the *Chase National Bank* and *Northern Trust cases* was a tax imposed on a *transfer* is made clear not only by the plain words of the statute but also by the decisions of this Court that Congress can not constitutionally impose an estate tax on a transaction which is not in substance a transfer at death. *Heiner* v. *Donnan,* 285 U. S. 312. See also *Knowlton* v. *Moore,* 178 U. S. 41, 47; *Stebbins* v. *Riley,* 268 U. S. 137, 141.

There is nothing in this Court's decision in *Tyler* v. *United States,* 281 U. S. 497, *supra,* to indicate the contrary, as the court below seems to have thought. (R. 111.) That case is not authority for the proposition that a death duty may be imposed by Congress without a transfer of property rights.

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[5] In his petition to the Board of Tax Appeals (R. 2–3) the taxpayer contended that Section 319 was unconstitutional for the same reasons which he now advances to support his argument that he is outside the terms of the statute. The claim of unconstitutionality has since been abandoned, but the argument remains the same.

It held only that a shifting of technical title is not an essential element of what is in substance a transfer. The opinion states (p. 503) in addition to what has already been quoted (*supra*, p. 15):

> Taxation as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants * * * did not have the effect of *passing to the survivor substantial rights, in respect of the property,* theretofore never enjoyed by such survivor. (Italics ours.)

In the *Tyler case,* moreover, as we have already pointed out, the decedent did not alone have power to dispose of the property in question, while here the taxpayer had an absolute and unqualified right to direct its disposition.

The precise question involved in this case was decided by the Court of Claims in *Means* v. *United States,* 69 C. Cls. 539, certiorari denied, 282 U. S. 849. It was there held that the termination by a settlor of his right to revoke a trust was a transfer of the trust property and thus taxable under Section 319. The court accepted the principles announced in the *Chase National Bank, Northern Trust,* and *Saltonstall cases* as conclusive, saying (p. 548):

> In these cases the precise question determined by the court was the effective date, within the meaning of the taxing statutes,

of the transfer of property where the donor in trust instruments had reserved to himself the unrestricted rights of revocation.

The court held in each case that the transfer was made when the possibility of the exercise of the rights of revocation ceased to exist; that until that time the gift was incomplete both to the donor and to the donee.

III

THE WORD "TRANSFER" WAS USED IN THE GIFT TAX PROVISIONS OF THE STATUTE IN THE SAME SENSE IT WAS USED IN THE ESTATE TAX PROVISIONS

The court below held (R. 114) that the word "transfer" was used in Section 319 so as to be applicable only to passage of the technical legal or equitable title. But there is nothing to indicate that the word "transfer" was used in Section 319 in a sense narrower than that in which it was used in the estate tax provision involved in the *Chase National Bank* and *Northern Trust cases.* On the contrary, there is every reason to suppose the word was intended to have the same meaning in the two sections, for the two kinds of taxes were imposed by the same Title of the same Act (see pp. 33–36, *infra*), and were parts of a single coherent taxing scheme, the gift tax being "adopted into the revenue act of 1924 as correlative to the estate tax." S. Rep. No. 52, 69th Cong., 1st Sess., p. 9. It seems absurd to say, as respondent's position requires, that termination by death of a power of control of property is a transfer of that property, and that termination by a voluntary act a week earlier is not.

The law was drawn to reach the passage of property by gift in either case, and what is a transfer for purposes of the estate tax would seem to be no less a transfer for purposes of the gift tax, especially since Congress used the same word—"transfer"—in respect of both, and in the same Act, and the same Title of that Act.[6] Moreover, as has been pointed out in Point I above, this was the contemporaneous administrative construction placed on the statute by the Commissioner at the time of its enactment (Article 1 of Regulations 67, *infra*, pp.

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[6] The reports of the Committee on Ways and Means of the House and the Committee on Finance of the Senate in respect of the gift tax provisions of the Revenue Act of 1932 give further support to the view that the word "transfer" in the 1924 Act should not be used in the sense of referring only to the conveyance of technical legal or equitable title. Though subdivision (c) of Section 501 of the 1932 Act (*infra*, pp. 37–38) specifically covers, among other things, situations like that at bar, it was not a part of the Bill at the time these committee reports were submitted, but was added subsequently by amendment on the floor of the Senate. (75 Con. Rec., Part 10, p. 11630.) So what the committees said in respect of the meaning of the word "transfer" in subdivisions (a) and (b), which in substance are the same as Section 319 of the 1924 Act, is strongly indicative of its proper meaning here. They said (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 27–28; S. Rep. No. 665, 72d Cong., 1st Sess., pp. 39–40):

"The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions (subject to certain express condi-

38–40), months before the respondent relinquished his power of revocation.

The court below also attached significance to its statement that in Section 302 (d) of the Revenue Act of 1924 (*infra*, pp. 33–34) trusts subject to powers of revocation were for the first time specifically mentioned in the estate tax provisions, while this was not done in the gift tax title. The court concluded from this fact that Congress intended that the two should be treated differently. (R. 110–111.) But the court's premise is too broad. Property subject to powers of revocation was taxable as a part of the gross estate under Section 402 (c) of

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tions and limitations) whereby, and to the extent (sec. 503) that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, * * * (7) where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the interim being gifts from A in the calendar years when received)."

Subdivision (c), in so far as it deals with situations like that involved here, was declaratory and was specifically intended to overcome the effect of the decision in this case, the opinion in which was rendered on May 2, 1932. (R. 109.) Subdivision (c) was offered and adopted May 31, 1932. (Cong. Rec., *supra*.) Congress had intended, the committee reports show, that subdivisions (a) and (b) should apply to termination of a power of revocation, as had been declared by the regulations and held by the Court of Claims in *Means* v. *United States*, *supra*, under Section 319 of the 1924 Act.

the Revenue Act of 1921, and by similar provisions in the two earlier Acts. *Reinecke* v. *Northern Trust Co.* 278 U. S. 339, *supra,* holding revocable trusts taxable under the estate tax, was decided under the 1921 Act. There was therefore no need to add Section 302 (d) to the 1924 Act to reach powers of *revocation;* that Section had a far different objective, which may be seen if its precise language is examined. It made the estate tax applicable to property transferred on a trust which "was subject * * * to any *change* through the exercise of a power." (Italics ours.) Obviously, Section 302 (d) was intended to reach a much broader class of trusts than those subject only to a power of revocation.[7]

Moreover, even if the court's premise were sound its conclusion does not follow. The estate tax imposed by Section 301 of the Revenue Act of 1924, as in the other revenue acts, was imposed upon the transfer, not of *property,* but of the *net estate*—a statutory concept, and it was of course necessary to prescribe what classes of property constituted the net estate. Cf. *Reinecke* v. *North-*

[7] The real purpose of Section 302 (d) is disclosed in such cases as *Brady* v. *Ham,* 45 F. (2d) 454 (C. C. A. 1st), and *Porter* v. *Commissioner,* 60 F. (2d) 673 (C. C. A. 2d), certiorari granted, November 14, 1932, where the settlor reserved a power to alter or amend the trusts but not so as to make himself beneficiary. Such a power is not a power to revoke; but it is a power to *change,* and comes within the ambit of Section 302 (d).

ern Trust Co., 278 U. S. 339, 348, *supra*. But the gift tax was laid upon the transfer of *property*, so that there was no similar necessity to define the subject of the transfer upon which the tax was imposed. The respondent's argument that the *Chase National Bank* and *Reinecke cases* did not involve a tax on transfers (Br. in Opp. 7–9) grows out of his refusal to recognize this distinction.

United States v. *Field*, 255 U. S. 257, upon which the court below largely relied (R. 114), is illustrative of this point. There a widow was given a general power of appointment by will over property of her husband, which the Government sought to include in her estate for estate tax purposes. As in all the revenue acts, the tax was imposed upon "the transfer of the net estate," and in the next succeeding sections it was prescribed what the *net estate* should include. The property over which the widow had and exercised the power of appointment did not fall within any provision of the latter section, and it of course followed, as this Court held, that it was not taxable since it was not included by the statute in its definition of the net estate. The *Field case* is therefore not in point here; the ground of the decision was not, as the court below seems to have thought (R. 114), that there was no transfer, but rather that the property involved was not defined by the statute as a part of the decedent's net estate.

The *Tyler case* also illustrates the necessity of observing the distinction between a tax laid upon the "transfer of the net estate" and one laid, as at bar, upon the " transfer of property." It was there said (p. 502):

> Section 201 imposes the tax "upon the transfer of the net estate "; and if that section stood alone, the inclusion of such property [property held on a tenancy by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute.

This language the respondent contends (Br. in Opp. 7–9) is authority for the proposition that the statute now in question does not reach termination of powers of revocation. Plainly this is not so. The language quoted says only that without the aid of the section prescribing what should be included in the "net estate" it would be doubtful whether property held on such a tenancy would be part of the net estate. The Court's meaning is made clear by the language which immediately follows (p. 502):

> But section 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present.

As in the case at bar, the tax was imposed upon the *transfer.*

IV

THE CONCLUSION OF THE COURT BELOW THAT THE GIFTS WERE COMPLETED IN 1917 IS PLAINLY ERRONEOUS AND IS INCONSISTENT WITH A LATER DECISION BY THE SAME COURT

The opinion of the court below closes with the statement that the gifts in this case were made in 1917, when the taxpayer created the trusts.[8] (R. 115.) This conclusion is of itself, we submit, strongly indicative of the error in the court's decision. Section 319 taxed property passing by gift during life, whether made directly or indirectly, and it is of course beyond question that there can be no gift at law until all dominion and control over the property given passes finally from the donor.

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[8] This view is, of course, unavoidable under the court's theory; for the question presented, the court correctly said (R. 110), was "as to when there was an effective transfer by gift," and if the transfer did not take place in 1925, when the power of revocation was terminated, it must of course have taken place in 1917.

Though disclaiming any intention so to hold, the effect of the decision of the Circuit Court of Appeals nevertheless is to declare that Congress was without power to impose an excise as for a gift *inter vivos* upon termination of a power of revocation. A gift tax is an impost upon the exercise of a right incident to ownership (*Bromley* v. *McCaughn*, 280 U. S. 124, 136), and if, as the court below held, the gift in this case was consummated in 1917 when the trusts were created (R. 115), and the subsequent relinquishment of the power of revocation "did not transfer but rather extinguished something" and "could not transfer anything of property" (R. 111, 112), it is obvious that no matter how the statute might have been drawn it would have been ineffectual to impose a valid tax upon occurrence of the later event.

Basket v. *Hassell,* 107 U. S. 602, 614. Equally beyond question is the proposition, on which the respondent cites so many cases (Br. in Opp. 11–13), that a valid trust can be created although a power to revoke is reserved. But it does not follow, as the respondent assumes, that such a trust has the incidents of a completed gift, no matter how valid and effective it may be as a trust. The contrary has been established by this Court. The revocable trust involved in *Corliss* v. *Bowers,* 281 U. S. 376, *supra,* was admittedly valid and effective, but the income from it was taxable to the settlor; the revocable trusts involved in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *supra,* were likewise valid without question, but their corpus was taxed as a part of the settlor's gross estate.

In a decision more recent than its decision in the case at bar, the court below dealt with the taxability, as part of the estate of a decedent, of property placed in trust by him for the benefit of other persons but as to which he reserved a right to change the beneficiaries in favor of others than himself. *Porter* v. *Commissioner,* 60 F. (2d) 673, certiorari granted, November 14, 1932, No. 466, October Term, 1932. The taxpayer there argued much the same as does the respondent here. But the court, contrary to its position upon this point in its decision in this case, relied upon the fact that as long as the settlor retained his power to "di-

vest" the beneficiaries, there was no gift to them. It said (p. 674):

> A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends.[9]

Manifestly it is quite impossible properly to regard the transfers in question as having taken place at any other time than when the powers of revocation were relinquished. It was only then that the gifts were made.[10]

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[9] It is interesting to note also that the opinion in the *Porter case* states that the *Field case* was decided upon the ground which we urge as distinguishing it from the present case. It said (p. 674): "*United States* v. *Field*, 255 U. S. 257, arose under the Act of 1916 (39 Stat. 756 as amended 39 Stat. 1000), which did not comprise general powers, and was decided for that reason." This, of course, is not consistent with the view taken by the court below in the present case. (R. 114.)

The decision in the *Porter case* acknowledges also that the *Northern Trust case* was decided upon the ground which we here urge. It said of the decision in that case: "The settlor had reserved a general beneficial power to revoke, whose termination by his death was treated as a taxable transfer."

[10] If, as the petitioner contends, the transfer took place when the trusts were created, it is interesting to consider what would have been the situation if the Gift Tax Act had been in effect at that time. Under the taxpayer's argument the tax would have been payable then. What would have been the situation if thereafter the settlor should have exercised his power of revocation? Would the taxpayer then have been entitled to a refund on the ground he had made no gift, although *ex hypothesi*, he had made a gift?

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, 279, provided in part as follows:

TITLE IV.—ESTATE TAX

* * * * *

SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: [then follows a schedule of percentages]

* * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time

of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part

of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

The Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 313, 314, 339, provides in part as follows:

TITLE III

PART I.—ESTATE TAX

* * * * *

SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States: [then follows a schedule of percentages]. (U. S. C., Title 26, Sec. 1092.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair

consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be ex-

cepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

* * * * *

PART II.—GIFT TAX

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer of a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: [then follows a schedule of percentages]. (U. S. C., Title 26, Sec. 1131.)

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (U. S. C., Title 26, Sec. 1132.)

* * * * *

SEC. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Sec. 1245.)

The Revenue Act of 1926, c. 27, 44 Stat. 9, 86, 87, provides in part as follows:

SEC. 324. (a) Section 319 of the Revenue Act of 1924 is amended to read as follows:

"SEC. 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the

sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: " [then follows a schedule of percentages smaller than those provided for in Section 319 of the Revenue Act of 1924, *supra,*].

(b) Subdivision (a) of this section shall take effect as of June 2, 1924.

SEC. 325. Any tax that has been paid under the provisions of Title III of the Revenue Act of 1924 prior to the enactment of this Act in excess of the tax imposed by such title as amended by this Act shall be refunded without interest. (U. S. C. App., Title 26, Sec. 1121.)

The Revenue Act of 1932, c. 209, 47 Stat. 169, 245, 246, provides in part as follows:

TITLE III.—GIFT TAX

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax

shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years. [Then follows a "Gift Tax Rate Schedule."]

REGULATIONS

Regulations 67, relating to the gift tax, promulgated November 8, 1924, under the Revenue Act of 1924, provides in part as follows:

ARTICLE 1. *Transfers reached.*—At common law the term "gift" is applied only to voluntary transfers of property made without consideration or compensation therefor.

But the taxing act with which these regulations deal employs the term "gift" in a wider and more comprehensive sense, for, while it embraces transactions which at common law amount to gifts, it goes further by including sales and exchanges for less than a fair consideration in money or money's worth. (See sec. 320.) Hence, the statute reaches and taxes all transfers of property made during the calendar year (other than the gifts specified in par. (3) of subdivision (a) and in par. (2) of subdivision (b) of sec. 321), to the extent that they are donative in character and exceed the authorized deductions.

The subject of the gift may consist of any species of property or interest therein, whether legal or equitable. Thus, for example, a taxable transfer may be effected by a transfer of real estate, by the declaration of a trust, by the forgiveness of an indebtedness, the payment of another's debt, the assignment of a judgment, or the transfer of cash, certificates of deposit, or of Federal, State, or municipal bonds. A sale or exchange for a consideration reducible to a money value which is less than a fair consideration amounts to a gift, within the meaning of the statute, to the extent that the fair market value of the property, at the time of the transfer, exceeds the consideration received. If the consideration is not reducible to a money value it is to be wholly disregarded. A transfer which is neither a sale nor an exchange does not involve a gift if there is a valid, even if not an adequate, consideration for the transfer.

The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income

of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

The statute embraces donative transfers made by corporations, associations, partnerships, trusts, and estates, as well as those made by individuals. (See art. 25.)

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